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Nos. 05-204, 05-254, 05-276, and 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*, Appellees.

TRAVIS COUNTY, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

EDDIE JACKSON, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

GI FORUM OF TEXAS, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF SAMUEL ISSACHAROFF, BURT NEUBORNE, AND RICHARD H. PILDES AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI CURIAE

The individual *amici* are Professors of Law who have devoted much of their careers to the study of the law of democracy.[1] We believe that the near elimination of competitive congressional elections in recent redistrictings, caused by nationwide political gerrymandering by both major political parties, erodes one of the structural foundations of the Constitution: representative self-government through competitive elections that hold representatives accountable to voters. Until now, this Court has struggled to analyze the dysfunction caused by political gerrymandering as a potential violation of the Equal Protection Clause. We respectfully submit this brief *amici curiae* to invite the Court's attention to an alternative analytical approach premised on constitutional protection of the essential foundation of representative self-government: electoral accountability through competitive elections.

INTRODUCTION

For over 40 years, the Equal Protection Clause has served as the principal constitutional vehicle for intensive judicial involvement in protecting the right to vote and to run for office.[2] This Court's insistence on rigorous compliance with principles of formal electoral equality has provided — and continues to provide — an essential foundation for American democracy. In the last decade, however, it has become clear that formal political equality can co-exist with suppression of the single most important element of democratic self-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, except for the assistance of Mayer, Brown, Rowe & Maw LLP in the formal production and filing of this brief.

[2] See *Kramer* v. *Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper* v. *Va. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962).

governance — competitive elections in which voters can hold their representatives electorally accountable.

When a state legislature designs a congressional apportionment that satisfies the formal mathematical norms of "one-person one-vote," but intentionally dispenses with competitive elections in virtually every congressional district — as in these appeals — the lens of formal equality fails to reveal the nature of the constitutional injury. Nor is that injury fully addressed in a search for a "fair" allocation of the political spoils between the political parties. Rather, the constitutional violation lies in the structural harm to representative self-government that results when state legislatures abuse their powers under the Elections Clause, Article I, § 4, and deliberately suppress competitive elections in systematic fashion.

To ensure that all elections are competitive is, of course, impossible. A natural political advantage enjoyed by one or another political faction in a geographical area may render election outcomes a foregone conclusion. Nothing in the Constitution or in democratic political theory guarantees a perennial political minority anything other than a fair chance to persuade the political majority and continued enjoyment of equal treatment under law. But as evident from the redistricting in this case — and the design of 90% of congressional districts nationwide — a lethal combination of modern technology, partisanship, and incumbent self-dealing renders it possible for state legislatures to assure that nearly all congressional elections are non-competitive.

Even as the parties dispute the distributional equity of one or another districting plan, the undeniable fact of modern political life is the virtual disappearance of competitive congressional elections. The post-redistricting elections in 2002 were the least competitive in American history: challengers defeated only four congressional incumbents. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10-11 (2003). More

than one-third of state congressional delegations did not change at all.[3] There were 338 incumbents who won by more than a 20-point margin, the generally accepted definition of a "landslide."[4] There were only 38 minimally competitive districts nationwide, using the generally accepted definition of less than a 10-point margin of victory (and even many of those districts were designed by commissions, not partisan legislatures).[5] These figures reflect a dramatic decline from previous decades in competitiveness.[6]

This lack of competitive elections for Congress does not reflect a dramatic sea change in the electorate's partisan preferences. While only one of eleven House elections was decided by less than ten percentage points, fully half of state governorships and Senate seats contested on the same day — in elections impervious to political gerrymandering — were instead competitive enough to be decided by less than this ten-point margin.[7] As one of the leading political science analysts of congressional elections puts it: "Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general

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[3] These numbers were compiled from the following sources: CQ's POLITICS IN AMERICA 2004: THE 108TH CONGRESS (David Hawkings & Brian Nutting eds. 2003); MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004 (2003); Clerk of the House of Representatives, *Statistics of the Congressional Election of November 5, 2002* (2003), at http://clerk.house.gov/members/electionInfo/2002election.pdf ("*2002 Election Statistics*").

[4] See Table 1, *infra*.

[5] See CQ's POLITICS IN AMERICA 2004, *supra*. On the effects of commission rather than legislative redistricting, see pages 17-18, *infra*.

[6] See Table 1, *infra*.

[7] Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 183 (2003) (assembling statistics).

election in U.S. history." Jacobson, *supra*, 118 POL. SCI. Q. at 10-11.

The virtual elimination of competitive congressional elections is no accident. State legislatures have orchestrated this disappearance using two forms of political gerrymandering. The first is the partisan gerrymander, such as the Texas plan before the Court, in which a faction with transitory dominance draws district lines to maximize its party's political advantage at the expense of the minority party. The second kind is the "sweetheart," bipartisan gerrymander, in which the two major parties work as a cartel and risk-aversely agree to allocate political representation to protect as many incumbents as possible.[8] Common to each form is intentional state legislative action to minimize the risk of competitive elections or eliminate that risk altogether. These tactics are effective. Even during the decades of gross malapportionment, disfranchisement, and a virtual Democratic Party monopoly on political power in the South, incumbents still lost 10-11% of the time on average during, for example, the 1930s and 1940s — as compared to 1.8% in the 2000s so far.[9]

None of the equal-protection arguments about the partisan implications of one or another districting plan captures the full insult to the constitutional commitment of electoral accountability that state legislative creation of overwhelmingly "safe" congressional districts entails. In California, for example, not a single challenger in the 2002 congressional general election received over 40% of the vote. *Id.* at 182. Political actors facing such an absence of electoral competi-

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[8] Experts characterize California, New York, Illinois, and Ohio (with a combined total of 119 seats) as having adopted bipartisan gerrymanders in which nearly all seats were protected, though both California (Democratic) and Ohio (Republican) were nominally under unified party control. Barone & Cohen, *supra*, at 44.

[9] HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2005-2006 47 (2006) (Table 1-14).

tion well understand that the power to "choose" representatives in "elections" resides, not in "the People," but in what this Court has elsewhere termed a "self-perpetuating body" of self-dealing insiders. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 793 n.10 (1995). One need look no further for proof than this unabashed admission regarding California redistricting by Rep. Loretta Sanchez, in which she describes the role of redistricting czar Michael Berman, the leading consultant to the controlling Democratic Party in drawing the new district lines:

> So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the 32 Democratic incumbents have paid Berman $20,000 each, she said, for an "incumbent-protection plan." "Twenty thousand is nothing to keep your seat," Sanchez said. "I spend $2 million (campaigning) every election. If my colleagues are smart, they'll pay their $20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them.[10]

No political actor seeking such a path to electoral sinecure has an incentive to bring before this Court the full constitutional harm that political gerrymandering of this sort imposes.

Not surprisingly, the arguments raised by the parties in political gerrymandering cases have involved claims of partisan excess and unequal treatment. The arguments have been accompanied by a complex set of formulae for distinguishing excessive partisanship from ordinary politics, ranging from the "consistent degradation" test of *Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986) (plurality), to the statistical models of increasing complexity offered in *Vieth* v. *Jubelirer*, 541 U.S.

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[10] H. Quach & D. Bunis, *All Bow to Redistrict Architect*, ORANGE COUNTY REGISTER, Aug. 26, 2001, at A1.

267 (2004). Such an equality-based effects approach to political gerrymandering requires the judicial construction of an undistorted, "fair" representational baseline against which the gerrymander may be tested. While the dissenters in *Vieth* sought to construct such a baseline, either district-by-district or statewide, the plurality in *Vieth* concluded that the difficulty of judicially determining an ideal hypothetical outcome to an election should limit the judicial role to the preservation of formal equality norms.

But the Equal Protection Clause, focused on alleged discrimination between the political parties, is not designed to address the full constitutional harms at stake in the systematic, intentional elimination of electoral competition and accountability. The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, which grants the States enumerated powers to regulate national elections only for legitimate purposes, is. *Amici* submit that this alternative analytical approach best reflects the structural constitutional values at issue in this case.

SUMMARY OF ARGUMENT

The Constitution contains at least three textual provisions that prohibit state legislative efforts to systematically design non-competitive congressional election districts and frustrate the Constitution's essential requirement that members of Congress be electorally accountable to the voters.

First, the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, delegates power to state legislatures to establish only the "times, places and manner" of congressional elections. Just as Article I's grants of enumerated powers to Congress necessarily limit the exercise of those powers to the reasons for which granted, the specific and limited delegation of power in the Elections Clause does not license state legislatures to eviscerate competitive congressional elections and undermine electoral accountability. Yet the systematic creation of overwhelmingly "safe" election districts on behalf of partisan allies does precisely that. The question before the Court

should not be simply whether, under the Equal Protection Clause, one of the major political parties has been unconstitutionally discriminated against in districting, but whether Texas or any other state has the constitutional power intentionally and systematically to insulate congressional candidates and incumbents from contested elections. The Elections Clause grants no such power.

This inherent limitation on state legislative authority over congressional elections is confirmed by two other provisions: Article I, § 2, which requires that the People (not the state legislatures) choose the members of Congress, and the First Amendment, which guarantees freedom of speech, assembly, association, and petition. Together with the Elections Clause, these provisions combine to prevent state legislatures from manipulating Congressional elections through the creation of overwhelmingly "safe" election districts. Under Article I, §§ 2 and 4, and the principle of representative self-government that motivates the First Amendment, the abuse of redistricting authority to turn congressional elections into empty rituals should be found unconstitutional.

Accordingly, just as this Court protects the structural imperatives of federalism and separation of powers, this Court should protect the Constitution's third great structural imperative — representative self-government through contested elections — from destruction at the hands of self-dealing political incumbents and their allies of both major parties. Manageable judicial standards to do so exist, including a bright-line rule, absent judicial order or extraordinary circumstance, against mid-decade redistricting.

ARGUMENT

I. Article I Of The Constitution Prohibits Anti-Competitive Political Gerrymanders That Virtually Eliminate Contested Congressional Elections And Substantially Diminish Electoral Accountability.

A. The Elections Clause Does Not Grant State Legislatures The Power Artificially To Eliminate Electoral Accountability And Competitive Congressional Elections.

The states' power to design congressional districts derives exclusively from the specifically enumerated grant of power in the Elections Clause, U.S. CONST. art. I, § 4, cl. 1. The states have no reserved or inherent powers over the regulation and design of congressional districts and elections. *Cook* v. *Gralike*, 531 U.S. 510, 522-23 (2001) ("No other constitutional provision [than the Elections Clause] gives the States authority over congressional elections * * *."); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-34 (1995) (state authority over national elections exists only insofar as specifically delegated in the Elections Clause).

Just as the grant of enumerated powers in Article I to Congress limits the exercise of those powers to the scope and objectives for which granted, see, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 553 (1995), the constitutional grant of specifically enumerated power to the states over congressional districting limits the scope and aims for which those powers can be exercised. *Cook*, 531 U.S. at 523 ("the States may regulate the incidents of [congressional] elections, including balloting, only within the exclusive delegation of power under the Elections Clause"). This Court has indicated many times the importance of ensuring that Congress' powers are limited to the scope and aims for which the Constitution specifically enumerates the grant of particular powers. See, *e.g.*, *Bd. of Trustees* v. *Garrett*, 531 U.S. 356, 365 (2001); *United States* v. *Morrison*, 529 U.S. 598, 607, 620-21

(2000); *City of Boerne* v. *Flores*, 521 U.S. 507, 516 (1997); *Lopez*, 514 U.S. at 553. In exactly the same way, the Court should continue to recognize that, when state legislatures exercise power pursuant to a specifically enumerated grant in Article I, this power is limited to the scope and aims for which the Constitution grants it.

In particular, state legislatures have no delegated power under Article I to design congressional districts for the purpose and effect of destroying the electoral accountability between representatives and citizens that is essential to representative democracy. The Elections Clause does not grant states the power to regulate congressional elections with the aim and effect of artificially insulating members of Congress from electoral competition through state creation of overwhelmingly "safe," non-competitive congressional election districts. As this Court noted in *Term Limits*, 514 U.S. at 833-34, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional constraints." See also *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932) (noting that the Elections Clause grants states the power to regulate national elections "as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right [to vote] involved").

The Elections Clause, like the Qualifications Clauses at issue in *Term Limits*, does not empower the states (or Congress) to design congressional districts in a way that "would lead to a self-perpetuating body to the detriment of the new Republic." 514 U.S. at 793 n.10. At the Constitutional Convention, James Madison noted the risk of leaving unfettered power in the hands of potentially self-interested political actors to regulate elections: "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect." *Ibid.* (quoting *Powell* v. *McCormack*, 395 U.S. 486, 534

(1969) (in turn quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 250 (Max Farrand ed. 1911) (Madison))). This Court has constrained the ability of political bodies to manipulate electoral outcomes through gerrymandering voting ("the number authorized to elect") and vote-counting rules. See, *e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222 (1985); *Bush* v. *Gore*, 531 U.S. 98 (2000). But artificially non-competitive election districts are now the most direct and devastatingly effective means of creating a "self-perpetuating body" in the House, in light of modern election-behavior data bases and sophisticated computer technology. The manipulation of district design to ensure artificially that one party or the other's congressional candidates face no meaningful competition on general election day is neither a necessary nor a proper exercise of the specific power delegated to the state legislatures in the Elections Clause.

This Court, and individual members of the Court, have recognized that numerous provisions of the Constitution were specifically designed to protect against even the *risk* of self-interested manipulation of the election process by those in power. That those temporarily in office will seek to leverage their power over election-rule design into more enduring power for themselves and their allies is eminently predictable. As Justice Scalia has noted, "the first instinct of power is the retention of power." *McConnell* v. *FEC*, 540 U.S. 93, 263 (2003) (concurring in part and dissenting in part). Similarly, Justice Thomas has observed that the structure of the Census and Apportionment Clauses reflected the Framers' realization that the danger of self-interested political manipulation of the Census and apportionment required that the Constitution "creat[e] a standard that would limit political chicanery." *Utah* v. *Evans*, 536 U.S. 452, 500 (2002) (dissenting).

If numerous provisions of the Constitution are understood to guard against the *risk* of self-interested manipulation of the election process, surely the Elections Clause prohibits the

actual, transparent, and even brazen self-interested manipulation involved in the willful creation of overwhelmingly "safe," non-competitive election districts that destroy electoral accountability. And unlike campaign-finance regulation or statistical sampling under the Census Clause, there can be no dispute about the purpose and effects of the current redistricting — and now, mid-decade redistricting — process: political insiders candidly admit that they intentionally design congressional districts to be overwhelmingly safe for partisan allies and incumbents. As the post-2002 redistricting elections demonstrate, these plans have achieved precisely that.

The Elections Clause does not empower state legislatures artificially to create overwhelmingly non-competitive congressional districting plans whose purpose and effect is overwhelmingly to insulate preferred candidates from electoral accountability. As noted above, not all districted elections can be made competitive. But just as there is a difference between natural and illegal economic monopolies, there is a difference between safe districts that arise naturally from following traditional districting principles in particular geographic areas and safe districts that arise because political insiders have grossly manipulated district designs for the purpose and effect of insulating preferred candidates from meaningful competition. The latter is not a permissible justification for exercise of the limited, enumerated power delegated to state legislatures on behalf of the people of the United States under the Elections Clause.

B. The Systematic Assignment Of Voters Into Overwhelmingly "Safe" Congressional Districts Threatens The Fundamental Voting Right Secured By Article I, § 2.

Article I, § 2, of the Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States * * *." The Constitution thereby expressly recognizes an af-

firmative right of the People to choose their representatives through properly structured congressional elections. This is the only textual reference to "the People" in the body of the original Constitution and the only express, original textual right of the People to direct, unmediated political participation in choosing officials of the national government.

Whatever issues may still cloud the justiciability of partisan vote dilution claims under the Equal Protection Clause, this Court has recognized for many decades its power to enforce strictly the guarantees to the People under Article 1, § 2. In *Wesberry* v. *Sanders*, 376 U.S. 1, 6-7 (1964), this Court rejected any justiciability claim "that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction * * *. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I."

The protections of Article I, § 2, specifically designed to guarantee the integrity of national elections, are greater than those under the general provisions of the Equal Protection Clause. This Court has so held with specific reference to the redistricting process. Compare *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) (striking down under Article I, § 2, congressional districts with population deviations of as little as six percent) with *Mahan* v. *Howell*, 410 U.S. 315 (1973) (upholding under Equal Protection Clause challenge state legislative with population deviations up to 16.4%).

As this Court has recognized many times, Article I, § 2, makes unconstitutional state electoral practices that obstruct the right of the People to "fair and *effective* representation" and "an equally *effective* voice" in the selection of representatives, as identified by *Reynolds*, 377 U.S. at 565-66 (emphasis added). The importance of the voting rights of the People in congressional elections is highlighted by three cases whose significance for the Article I, § 2, implications

of non-competitive congressional districts has been underappreciated: *Powell*, *supra*; *Term Limits*, *supra*; and *Cook*, *supra*. Each overturned an effort to deny or improperly condition the ability of the People of a State to choose freely a congressional representative of their choice, either by congressional refusal to seat a disfavored representative (*Powell*), by state constitutional restriction on the ability to return a preferred candidate to office (*Term Limits*), or by imposition of conditions that compelled the attention of voters to predetermined issues (*Cook*). In each case, as expressed in *Term Limits*, this Court sought to "vindicate[] the same 'fundamental principle of our representative democracy' that we recognized in *Powell*, namely, that 'the people should choose whom they please to govern them.'" *Term Limits*, 514 U.S. at 819 (quoting *Powell*, 395 U.S. at 547 (internal quotation marks omitted)).

These cases recognize two principles with direct bearing on the unconstitutionality of grossly manipulated "safe" elections. First, the Court reiterated the importance of the sovereignty of the people in selecting freely their own representatives; as expressed by Justice Kennedy, "nothing in the Constitution or The Federalist Papers * * * supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Term Limits*, 514 U.S. at 842 (concurring). Recalling the infamous Wilkes incident from Britain, in which Parliament attempted to usurp the power to decree proper representation, *Powell* turned to the "fundamental principle of our representative democracy," 395 U.S. at 547, "'that the people should choose whom they please to govern them.'" *Ibid.* (quoting 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed. 1876) (A. Hamilton, New York)).

Second, this Court identified a concern at the Founding that reposing the power to set the terms of congressional qualifications in the hands of incumbent officeholders would

be a direct threat to the constitutional guarantee of voter sovereignty:

> [In *Powell*,] we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston * * * endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.'" 395 U.S. at 541 n.76, quoting 2 Elliot's Debates 292-293.

Term Limits, 514 U.S. at 794-95 (omission in original).

Whatever the right of the political parties not to be discriminated against in districting, the central question before this Court *should* be whether the carving up of essentially uncontestable and uncompetitive spheres of influence is an impermissible effort, in purpose and effect, that threatens to "lead to a self-perpetuating body" as identified in *Term Limits*, 514 U.S. at 793 n.10. The constitutional principle that meaningful electoral accountability depends on the competitive integrity of congressional elections is not captured through the narrow framework of impermissible partisan advantage previously presented in *Bandemer* and *Vieth*.[11] Article I, § 2's specific grant of an affirmative right of the People to demand the accountability of their Representatives itself requires protection against artificially manipulated, noncompetitive elections. As expressed by Justice Kennedy, "freedom is most secure if the people themselves, not the

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[11] Nor is *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), to the contrary. *Gaffney*, like *Bandemer*, addressed Equal Protection limitations on state legislative redistricting for state legislatures. Neither case addressed the Article I limitations on state legislative power over congressional elections.

States as intermediaries, hold their federal legislators to account for the conduct of their office." *Cook*, 531 U.S. at 528 (concurring).

Yet as noted above, congressional elections in the wake of the post-2000 redistricting were the least competitive in American history. No matter which way the question is framed — incumbents defeated, incumbents retired, incumbents victorious in a landslide — the 2002 elections were less competitive than after any redistricting in any decade since *Baker* v. *Carr*. The following published Table provides the summary statistics:[12]

[12] Hirsch, *supra*, 2 ELECTION L.J. at 182.

Table 1. Comparison of the 2002 Election with Elections from 1972 to 2000

Category	Average "normal election" (1974–1980, 1984–1990, 1994–2000)	Average post-reapportionment election (1972, 1982, 1992)	2002 Election
Incumbents reelected	375	348	381
By > 20 points	297	261	338
By < 20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8[13]
Incumbent retirements	37	48	35
New members	60	87	54

As also noted earlier, the leading academic experts conclude that redistricting patterns were "a major reason" for the near elimination of competitive elections in 2002. See Jacobson, *supra*, 118 POL. SCI. Q. at 10-11. These results are even more troubling because the first election after the de-

[13] Challengers defeated only four incumbents in the 2002 election. An additional four incumbents lost seats due to diminution in the size of their States' congressional delegations. They challenged other incumbents and lost.

cennial Census, reapportionment, and redistricting is historically the time when congressional elections are *most* competitive. When not intentionally manipulated to eliminate competitive elections, redistricting is historically the moment at which incumbents and prior political coalitions are most destabilized and elections therefore most open to new blood. As the data presented above show, with new incumbents settling into their seats in new districts, congressional elections typically become less and less competitive over the ensuing decade.

The impact of self-interested, anti-competitive gerrymandering on electoral accountability is also demonstrated by marked differences between the competitiveness of Congressional districts in 2002 when courts or commissions designed districts compared to when partisan state legislatures did so.[14] In the 17 states using commissions or courts to draw congressional lines, 31% of the commission-drawn districts were competitive enough to preclude a landslide, 23.3% of the court-drawn districts were similarly competitive, but only 16% of the legislatively-drawn districts were competitive enough to be won by less than a landslide.[15] A decade earlier, the 1992 redistricting produced the same general pattern: commission-drawn districts were the most competitive, followed by court-drawn districts, with legislatively-drawn districts the least competitive. The major difference between 1992 and 2002 was a decline of almost 50% by 2002 in the number of congressional districts not won by a landslide when legislatures controlled districting. Thus, these data further confirm the perverse "perfection" in recent years of the

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[14] Data and analysis in this paragraph are from Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representative Races*, 4 ST. POL. & POL'Y Q. 455-69 (Winter 2004).

[15] A race is defined here as competitive if the winning candidate received less than 60% of the two-party vote in the general election. *Id.* at 460.

political insider's "art" of undermining competitive congressional elections.

The cost of these "designer districts," artificially manipulated to ensure non-competitive elections, is not just the loss of electoral accountability that is the defining element of representative self-government. Competitive elections also are essential to other tangible democratic and constitutional values. Thus, it is well documented that competitive elections encourage the appearance of strong challengers to incumbents and increase voter turnout and party mobilization.[16] The two-party system itself is enhanced over the long run by competitive elections, for political parties that are overwhelmingly dominant in particular localities have no greater incentives than do lazy monopolists in economic markets.[17]

Finally, the structural role of the House is to be the institution most immediately and directly responsive to shifts in popular political preferences. Elections every two years and minimal qualifications for office were designed for exactly this reason. That is why mid-term congressional elections have historically served, as designed, as a partial referendum on national policy in the long interval between Senatorial and Presidential terms. State legislative abuse of the Elections Clause power interferes with this intended structural role of the House. As a result of anti-competitive districting, the

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[16] See STEVEN J. ROSENSTONE & JOHN M. HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 177-88 (1993); L. Sandy Maisel & Walter J. Stone, *Detriments of Candidate Emergence in U.S. House Elections: An Exploratory Study*, 22 LEG. ST. Q. 79 (1997); Gary C. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in 1982 U.S. House Elections*, 83 AM. POLI. SCI. REV. 217 (1989); see also EVERETT C. LADD, WHERE HAVE ALL THE VOTERS GONE (1982) (identifying greater sense of efficacy among voters able to hold incumbents accountable).

[17] ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES (1998).

House is now perhaps the *least* responsive institution in the national government:

> A national swing of five percent in voter opinion — a sea change in most elections — will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion and thus frustrates change and creates undemocratic slippage between the people and their government.[18]

The Constitution prohibits state legislatures from undermining the House's essential structural role. Article I, § 2, works hand-in-hand with the Elections Clause. The Elections Clause does not grant state legislatures the power to manipulate congressional elections for impermissible reasons. This limitation on the grant of power is necessary to protect the affirmative right "of the People" in Article I, § 2, to choose their Representatives.

C. The Elimination Of Electoral Accountability Through The Willful Evisceration Of Competitive Elections Violates The Fundamental Purpose Of The First Amendment.

In addition to the Article I concerns already addressed, the intentional evisceration of competitive congressional elections violates the First Amendment. Widespread anti-competitive gerrymanders do grave violence to the profound relationship — both substantive and textual — that this Court has recognized between self-government and the First Amendment. See *McIntyre* v. *Ohio Elections Comm.*, 514 U.S. 334 (1995); *Williams* v. *Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring); see generally JOHN H. ELY, DEMOCRACY AND DISTRUST 77, 101-03 (1980).

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[18] Daniel R. Ortiz, *Got Theory?*, 153 U. PENN. L. REV. 459, 487 (2004).

The Framers organized the six textual clauses of the First Amendment in disciplined order. That order parallels the emergence of a democratic idea, moving from a citizen's conscience, to individual expression (speech), to mass expression (press), to political organization (assembly and association) and, finally, to interaction with elected officials (petition). Indeed, it is common ground that the First Amendment's core purpose is the protection of the free flow of information needed to permit genuine electoral choice. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). When, as here, genuine electoral choice is systematically subordinated to partisan advantage, the damage to the First Amendment is unmistakable.

Moreover, the clauses themselves describe the essence of self-government. The quintessential act of political expression is the casting of a ballot. The quintessential act of political association occurs in the relationship between a voter and a favored candidate. The quintessential act of assembly is the rallying to the polls on Election Day. The election itself is the modern analogue of the petition for redress of grievances. When statewide political gerrymanders — either partisan as in this case, or bipartisan as in other settings — turn virtually every congressional election into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.

When an obvious political gerrymander, especially a mid-decennial exercise in partisan politics, systematically constructs islands of voters throughout a state in such a manner that competitive elections are virtually eliminated in every congressional district, the core element of self-governance — competitive elections — has been artificially destroyed. It matters not that the apportionment respects formal equality.

It matters not that the resulting political division of congressional representation is said, in some contexts, to be roughly equitable. What matters is that the state has treated voters, not as individuals, but as fungible political units whose democratic role is not self-governance, but the allocation of political spoils. See *Elrod* v. *Burns*, 427 U.S. 347 (1976) (government employees may not be viewed as political units designed to allocate the spoils of victory); *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996) (applying *Elrod* to independent contractors); cf. *Miller* v. *Johnson*, 515 U.S. 900 (1995).

II. Article I And The First Amendment Require A Per Se Rule Against Mid-Decade Redistricting, Absent Judicial Order Or Extraordinary Circumstance.

A. Mid-Decade Redistricting Requires A Per Se Rule.

Whatever the Court's response to the inevitable abuses at the decennial reapportionment stage, this Court should recognize that the Elections Clause does not grant state legislatures the power to engage in mid-decade re-redistricting, absent judicial decision requiring it or extraordinary circumstance (such as Hurricane Katrina and the accompanying massive population shifts). Such a bright-line, per se prohibition on mid-decade redistricting is required to enforce the limitations of the Elections Clause's grant of enumerated power and to reinforce the constitutional protection of electoral accountability and competitive elections. The risks that mid-decade districting will be used for purposes not within the scope of the Elections Clause, and the costs of mid-decade redistricting, are simply too substantial to tolerate.

The constitutional requirements of the decennial census and congressional reapportionment, U.S. CONST. art. I, § 2, cl. 3, combined with the constitutional requirement of one person, one vote, require the states once a decade to exercise their Article I powers. When this power lies in the hands of

partisan, self-interested incumbents (as in most states), it is predictable and inevitable that those insiders will seek to insulate their allies from electoral accountability, to pursue partisan advantage, or both.

The misuse of these Article I powers artificially to eliminate electoral accountability and create non-competitive districts, as noted above, is unconstitutional in any context. But whatever the Court's response to abuses during the decennial redistricting process, the risk that mid-decade redistricting will be used to abuse the Elections Clause power mandates a discrete rule dealing with mid-decade redistricting. A bright-line, per se prohibition will forestall the risk of a spiral of retaliatory mid-decade re-redistrictings, as the political fortunes of the two parties ebb and flow throughout the decade across different states or as incumbents find themselves at electoral risk.

No constitutional compulsion — indeed, no legal compulsion of any sort — exists for state legislatures to engage in redistricting during the decade as partisan political prospects wax and wane in particular states. Indeed, nothing in our historical experience compels this extraordinary assumption of power by the state legislatures. In the 20th century, there had been no practice of mid-decade congressional redistricting of which we are aware before mid-decade redistricting efforts suddenly erupted this decade. Rather, the emergence of this practice results from a combination of (1) closely balanced partisan control of the House and (2) technological breakthroughs in election data bases and computer technology that enable "perfecting" the self-interested creation of overwhelmingly safe districts. The partisan margin of power in the House has hung in the balance for a more sustained period than at any time over the past 100 years;[19] when partisan control was last divided as closely, numerous state legislative

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[19] See *2002 Election Statistics*, *supra*.

schemes sprung up to manipulate congressional elections.[20] National legislation and constitutional law now prohibit most of the offending historical practices, such as legislative manipulations of suffrage rules and vote fraud. But given the allure of political power, efforts to invent new practices not yet prohibited — such as mid-decade redistricting — will inevitably arise again when partisan control of the House is at stake.

We do not defend the constitutionality, the fairness, or the appropriateness of the prior legislative plans that preceded the recent mid-decade redistrictings in Texas, Colorado, and Georgia. But a per se rule against mid-decade congressional redistricting, not required by judicial decision or extraordinary circumstance, is the most appropriate judicial means to implement the guarantees and limitations of Article I and the First Amendment. The risk that such a power will be used for constitutionally impermissible purposes is obvious; the benefits of such power for legitimate purposes are undemonstrated, given the absence of a historical state practice of mid-decade redistricting; and, even assuming mid-decade redistricting might conceivably be used in some context for permissible purposes, the courts will find it difficult on a case-by-case basis to distinguish mid-decade redistricting that reflects constitutionally permissible versus impermissible purposes. To judge whether a prior plan was "fair," or whether the new, mid-decade plan uses the purported unfairness of the prior plan to justify a new plan that is also "unfair," requires the Court to re-visit the inquiries that divided it in *Vieth*. To judge the sole, dominant, or partial purpose of a particular mid-decade redistricting similarly re-

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[20] Thus, in the late 19th century, when partisan control of the House similarly hung in the balance over many years, practices of vote fraud, intimidation, manipulation of suffrage rules, and extraordinarily gerrymandered election districts, proliferated. See J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in CONTROVERSIES IN MINORITY VOTING 135, 141-52 (B. Grofman & C. Davidson eds., 1992).

quires difficult judicial determinations — and only invites political actors to disguise their purposes better next time around.

This Court should not get mired in those inquiries. A bright-line rule that the Elections Clause does not permit mid-decade redistricting is the most appropriate means to enforce the Elections Clause's enumerated grant of limited power to state legislatures. See *Crawford* v. *Washington*, 541 U.S. 36, 67 (2004) (holding that constitutional guarantees of proper legal process must be protected through bright-line, categorical rules to withstand inevitable pressures to distort in controversial cases).

A per se prohibition also reinforces the right incentives for political actors who control districting. If districting is endlessly open to revision, those actors likely to lose at the start of a new districting cycle have an incentive to paralyze the process, to game the outcome that might be reached, perhaps through a court-drawn plan, and then to revisit the plan if they dislike it and gain more legislative power over the decade. A per se rule makes clear that political actors must negotiate and compromise at the start of the decade, at the risk otherwise of losing control of the outcome. A per se rule also indirectly constrains partisan gerrymandering. Justice O'Connor suggested in *Bandemer*, 478 U.S. at 152 (concurring), that "political gerrymandering is a self-limiting exercise." To that extent that remains so in the age of computer technology, it is because political actors must bind themselves to a redistricting plan at the start of the decade and live with the consequences until the next Census. Mid-decade redistricting destroys that inherent, structural check. See *Salazar* v. *Davidson*, 79 P.3d 1221 (Colo. 2003) (holding mid-decade congressional redistricting designed to protect vulnerable incumbents unconstitutional under state constitution), *cert. denied*, 541 U.S. 1093 (2004).

Moreover, were mid-decade redistricting to be permitted, the political parties would inevitably engage in retaliatory re-

redistricting — particularly when partisan control of the House is closely divided. In the dormant commerce clause context, this Court recognized long ago that the appropriate means to address discriminatory state commercial laws was not for states to enact retaliatory discriminatory laws of their own; instead, this Court declares such laws unconstitutional, lest a downward spiral of retaliation, in which national prosperity is drained, ensue. See *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994) (condemning "local economic protectionism, laws that would excite those jealousies and retaliatory measures that the Constitution was designed to prevent. See THE FEDERALIST NO. 22 143-145 (C. Rossiter ed. 1961) (A. Hamilton); James Madison, *Vices of the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON 362-363 (G. Hunt ed. 1901)."). The Court should instead stop this cycle in its inception by recognizing that the Constitution does not authorize states to engage in mid-decade redistricting, at least absent judicial compulsion or extraordinary circumstance.

B. Judicial Standards Are Available For Future Decennial Redistricting.

For contexts outside that of mid-decade redistricting, including more routine, decennial redistricting, the specific standards courts can employ to respond to the attempts of state legislatures to eliminate or diminish electoral accountability and competition, cannot adequately be addressed here. Suffice it to say, a principal tool for legislative self-dealing in this context is running roughshod over traditional districting principles: the freewheeling parceling out of pieces of towns, cities, and counties into a number of different districts; the cavalier disregard of any obligation to keep districts reasonably compact; the use of wholly artificial means to purportedly keep districts "contiguous," in only the most nominal sense; and the use of increasingly refined partisan electoral data in the districting process. See, *e.g.*, *Karcher* v. *Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring); *Shaw* v.

Reno, 509 U.S. 630 (1993). In earlier decades, respect for these principles imposed tacit constraints on the extent to which self-interested redistricters could manipulate district design to insulate preferred incumbents and candidates from political competition and electoral accountability. As with other tacit constraints, once these informal, generally accepted limitations on unmediated pursuit of political self-interest begin to break down, a race to the bottom quickly ensures the virtual elimination of these traditional constraints altogether. Mid-decade redistricting is but one example of the recent erosion of such long-understood constraints.

It is essential to recognize that judicial standards in this area need not take the form of bright-line rules, with necessary and sufficient doctrinal criteria of application fully specified in algorithmic-like form. Just as in other areas involving the Constitution's central structural commitments, certain aspects of gerrymandering's constitutional threat might lend themselves to bright-line judicial doctrine; others will not. In enforcing federalism and limits on enumerated national powers, for example, this Court has been able to craft bright-line rules in certain contexts. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997) (anti-commandeering rule). But for other contexts, this Court has candidly acknowledged that even the best formulated doctrine will inevitably leave "legal uncertainty" concerning the doctrine's boundaries. *Lopez*, 514 U.S. at 565; *see also id.* at 579 (Kennedy, J., concurring) ("[A]s the branch whose distinctive duty it is to declare 'what the law is,' *Marbury v. Madison* [citation omitted], we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines."). Nonetheless, as the Court concluded in *Lopez*, "[a]ny possible benefit from eliminating this 'legal uncertainty'" — either through abandoning judicial enforcement or overly rigid judicial doctrine — "would be at the expense of the Constitution's system of enumerated powers." *Id.* at 566. See also *Boerne*, 521 U.S.

at 520 (employing "congruence" and "proportionality" standard).

Similarly, in enforcing the separation of powers, this Court has sometimes recognized violations that lend themselves to bright-line boundaries. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986) (invalidating an "active role for Congress in the supervision of officers charged with the execution of the laws it enacts"). But for some of the most momentous issues, the Court has acknowledged that maintaining the proper constitutional balance between diffusing and integrating governmental power cannot be judicially enforced through highly determinate legal doctrine. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."). The structural foundations of the constitutional order, including the commitment to self-government through the electoral accountability of representatives, are too essential to be judicially unenforceable, but too complex always to yield to bright-line judicial doctrine. "The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Gov't of Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

Judicial standards for enforcing the limits on the power delegated to state legislatures in the Elections Clause, and for enforcing the right of "the People" under Article I, § 2, and the First Amendment to hold their representatives electorally accountable, should be evaluated in this context, not against abstract ideals of doctrinal perfection neither available nor applied in enforcing the Constitution's other fundamental structural commitments.

CONCLUSION

Three structural ideas permeate the Constitution: separation of powers, federalism, and representative self-government. One of the institutional triumphs of this Court has been the forging of constitutional doctrine preserving separation of powers[21] and federalism[22] in settings where leaving these commitments to the political branches cannot protect the relevant structural values. While the contested nature of separation of powers and federalism occasionally involve the Court in controversy, the Court has recognized that judicially-enforced constitutional law must provide a keystone for two of the Constitution's three great structural arches.

The third structural arch and arguably the most important — representative self-government through periodic competitive elections, in which voters are able to hold their representatives accountable — similarly cannot be left to the political process itself. Mid-decade redistricting, absent judicial order or extraordinary circumstance, should be unconstitutional. Judicial standards should also be developed to limit state legislative abuse of the Elections Clause power in the more regular decennial redistricting context.

For all these reasons, the decision below should be reversed.

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[21] See, *e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Clinton* v. *City of New York*, 524 U.S. 417 (1998); *Bowsher*, *supra*; *INS* v. *Chadha*, 462 U.S. 919 (1983); *Youngstown Sheet & Tube Co.*, *supra*; *United States* v. *Nixon*, 418 U.S. 683 (1974).

[22] For "vertical federalism," see, *e.g.*, *Morrison*, *supra*; *Lopez*, *supra*; *NLRB* v. *Jones & Laughlin Steel Corp.*, 310 U.S. 1 (1937); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). For "horizontal federalism," see, *e.g.*, *C & A Carbone, Inc.*, *supra*; *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994); *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

Respectfully submitted.

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